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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA S.A., and COMPAGNIE GENERALE DE NAVIGATION A VAPEUR CYPRIAN FABRE
Petitioners

AGAINST

ROBERTO HERNANDEZ, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Compania Espanola de Navegacion Maritima S.A., a Spanish corporation, and Compagnie Generale de Navigation a Vapeur Cyprian Fabre, a French corporation, respectfully show:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its decision rendered January 6, 1941, reversing a judgment of the District Court for the Southern District of New York entered March 7, 1940 (R. 150-51). That judgment dismissed the complaint of Roberto Hernandez,

Inc., a New York corporation (respondent herein), in a suit brought under Section 30 of the Shipping Act, 1916 (46 U. S. C. 829) to enforce a reparation award by the United States Maritime Commission based on Section 22 of said Act (46 U. S. C. 821) for $25,050 with interest.

The complaint alleged a discrimination in the nature of conspiracy against plaintiff (respondent) for alleged refusal in 1934 to transport automobiles from New York to Spain. Although relying on the Shipping Act generally, the complaint was really based on Section 14 thereof (46 U. S. C. 812). The two petitioners were members, with another line, of an approved Conference under Section 15 of the Shipping Act (46 U. S. C. 814). The several Conference members operated as common carriers between New York and Spanish ports, including Bilbao.

The suit was tried in November 1939 before District Judge Galston without a jury, and he made special fact findings and conclusions in accordance with Rule 52 (R. 148-50).

The District Judge sustained some of the findings made by the Maritime Commission on the preliminary proceedings, and overturned others on the ground that they were not supported by the record. He found that the respondent had not proved financial ability to tender shipments, and had failed to avail of substitute service which could have been secured without extra cost, so that no damages were established by respondent. Under Section 30 of the Shipping Act (46 U. S. C. 829) the Commission's findings and order were merely "*prima facie* evidence of the facts therein stated". The case was tried fully before the District Court, with evidence on both sides additional to what had been submitted to the Maritime Commission.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 849, and that of the District Court in 31 F. Supp. 76.

Summary Statement

Respondent by its complaint claimed to have entered into an "oral contract" at New York on or about June 24, 1934, with one de Bareno, an automobile dealer of Bilbao, Spain, under which it was to ship to de Bareno at Bilbao an average of $25,000 worth of automobiles in each of the months June to December, 1934, to be purchased by de Bareno at 17½% off the New York retail price, with a commission to respondent of 15% (R. 4-5, 105). It seems that de Bareno was a cut-rate dealer at Bilbao competing actively with authorized distributors. There was no trace in writing of this $175,000 "contract". De Bareno gave a deposition at Bilbao (R. 103), and the Commission found that the contract existed. There was no contrary evidence in the District Court and this finding was sustained (R. 148).

Neither the Commission nor the District Court found that shipment over petitioners' Conference lines was required under said contract, nor did the complaint so allege (R. 3-7).

The only letter of credit opened by de Bareno was one of July 2, 1934, for $14,200 in favor of Hernandez, to expire August 2, which was extended to October 2. Hernandez shipped about $8,000 worth of automobiles to de Bareno, but claimed that due to unlawful discrimination by three carriers, including both petitioners, and their refusal to furnish space, it was prevented from shipping $167,000 worth of automobiles, which would have afforded Hernandez a profit of $25,050 in commissions, on the basis of which

loss of commission damage in that amount was claimed. The complaint did not allege that any effort whatever was made by Hernandez to ship over the lines of other carriers nor was there any evidence of any such effort by Hernandez. The theory of the complaint appears to be that respondent was entitled to recover the lost commission as damages if refusal of petitioners to carry was established, irrespective of other considerations. This was respondent's theory before the Commission (R. 89).

Hernandez had a 1934 all-shipment contract dated March 31, 1934, with the petitioners (and another line) as members of the Spanish Conference lines (R. 112-16), which permitted shipment over other lines in event space was not furnished as applied for (R. 115). This contract provided for arbitration at New York of "all differences and disputes of whatsoever nature" arising out of it. Hernandez did not demand arbitration and appears to have disregarded said contract. It was not submitted in the proceedings before the Maritime Commission and was first relied on by plaintiff at the trial in the District Court (R. 49-50, 54). The District Judge found that use of available substitute service was permissible to Hernandez under said contract, but that Hernandez "failed to avail of the same or to take other steps to mitigate the damage claimed" (R. 149).

The result of the reparation proceeding instituted by Hernandez before the Maritime Commission was a decision December 20, 1937, that the petitioners, together with Arnold Bernstein Company (not served in the District Court), were *jointly and severally* liable for discrimination, but that damages were not adequately shown (R. 81-90). As a result of further hearings the Commission on May 25, 1939, decided that damages were shown to be

$25,050, being the amount of commission Hernandez claimed would have been received had the $167,000 worth of automobile shipments, for which certain ships were calculated to have space, been transported to Bilbao, with interest on said amount from December 31, 1934 (R. 91-98).

The findings of the Commission sustained by the District Court appear at R. 148.

The holding of the Maritime Commission that petitioners were jointly and severally liable was based solely on the fact that the carriers were associated in a Conference under Section 15 of the Shipping Act. The North Atlantic Spanish Conference Agreement as approved by the Maritime Commission provides for "just and economic coöperation between steamship lines operating in this trade", etc. (R. 119). The Commission referred to a Conference cable of June 14, mistakenly as of July 19 (R. 87), in reply to a cable of June 9, 1934, from Spain, which stated, "Must advise you Shipping Board has ruled Conference lines cannot refuse contracts or shipments Stop Up to present no cars shipped" (R. 87, 96). Thus the Commission gave the cable an effect the reverse of its language, and implied a purpose on the part of the carriers to disregard their well known legal obligation, both under the law and under their Conference agreement, to accept shipments for carriage. Inasmuch as the Commission found the oral contract between Hernandez and de Bareno to have been made June 24, 1934 (R. 82) it simply was not possible that said cables referred to that matter.

It was mere matter of computation to figure the space that would have been available on particular sailings for complainant's shipments (assuming them to have been tendered). The result of the Commission's computation, totaling space for at least $167,000 worth of automobiles,

appears at R. 92-93. Neither technical skill nor administrative discretion was required to make such computation. The result of it was speculative at best, as the District Judge demonstrated—"a purely arbitrary analysis of speculative figures" (R. 138).

On this basis both in the District Court and the Circuit Court of Appeals petitioners contended that the Maritime Commission had no jurisdiction inasmuch as the plaintiff had the right to proceed immediately in Court for any legal damages it could establish. Nevertheless both courts upheld the jurisdiction of the Commission by reason of this Court's decision in *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474.

Petitioners also denied in both Courts below any right of plaintiff to recover against the carriers other than severally, contending that the Conference agreement approved under Section 15 of the Shipping Act did not afford any basis for joint and several liability.

District Court Findings

Fact findings 2, 3 and 4 by the District Court were (R. 148-9):

2 "On May 25, 1939, the United States Maritime Commission, after further hearing rendered a second decision finding that the plaintiff could have obtained and shipped $167,000 worth of automobiles in compliance with its contract and in accordance with the bookings requested, and that plaintiff's net profit would have been 15 percent of $167,000, or $25,050, and entered the order which is the subject matter of this litigation. *Said finding and order are not supported by the record, are based on various uncertain and speculative factors, and are not sustained.*" (Italics ours.)

3 "The plaintiff did not have on hand or in transit the cars with which to avail of the space open on any designated sailing. Financial ability of the plaintiff to secure $167,000 worth of cars from June 1934 to December 31, 1934, so as to be able to tender shipment thereof was not proved."

4 "There was available to the plaintiff an equivalent substitute service with regular sailings via British or continental ports on through bills of lading in place of direct shipment from New York to Bilbao, Spain, and such transshipment was feasible for the plaintiff at the same transportation cost, and this was permissible under a contract dated March 31, 1934, which plaintiff had with defendants, but plaintiff failed to avail of the same or to take other steps to mitigate the damage claimed."

Conclusions of law 3 and 4 of the District Court were (R. 150):

3 "The plaintiff was under an obligation to mitigate or avoid damages, which could have been accomplished without extra cost through other available means of shipment which plaintiff failed to avail of."

4 "No damages have been established by plaintiff and the complaint should be dismissed."

Decision Below

The Circuit Court of Appeals, on the theory that there was no new evidence introduced by either party at the District Court trial, held that the *prima facie* findings of the Maritime Commission should have been upheld as correct (R. 163). This disregarded the findings of the District Judge which were distinctly based on additional evidence on the subject of damages introduced by both parties in the District Court. With respect to this new evidence regarding mitigation the Circuit Court of Appeals intimated that if respondent had applied to other

lines they *might* also have refused space to respondent. This was notwithstanding the clear finding of the District Court that the respondent had a clear opportunity to mitigate or prevent damages by availing of substitute routes, and was permitted to do so by its contract with petitioners —and notwithstanding the clear finding that respondent had not shown financial ability to tender shipments (R. 149).

The Court accepted (R. 163-4) the contention of Hernandez that the "contract" with de Bareno could not be met except by shipment over the Conference lines,—not urged in the proceedings before the Maritime Commission nor specified in the complaint, and not adopted, but rejected, by the District Court (R. 146-7). The finding of the District Court that other means of shipment were permissible and available would seem to have foreclosed acceptance of this contention.

Basis of Jurisdiction

Jurisdiction is based on Section 240 of the Judicial Code. The order for mandate was entered in the Circuit Court of Appeals on January 23, 1941.

Questions Presented and Reasons Relied on for Granting of the Writ

The decision of the Circuit Court of Appeals is in error:

1. In upsetting and failing to uphold the fact findings of the District Court, and failing to apply thereto Rule 52 of the Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous and that

due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. This error alone would appear to call for summary reversal of the decision.

The trial in the District Court involved substantial evidence in addition to what had been presented to the Maritime Commission. Hernandez testified before the District Judge and so did four witnesses for petitioners, on matters which were not presented at all to the Commission concerning the March 31, 1934, contract and avoidance of damages by availing of other shipping services.

The District Judge had full opportunity to judge credibility, which is reflected definitely by his positive findings 3 and 4 (R. 149). Hernandez was shifty and vague (see R. 59-69, 72-76). The earlier findings of the Maritime Commission were *prima facie* only under Section 30 of the Shipping Act (46 U. S. C. 829) subject to the same limitations as findings of the Interstate Commerce Commission (unlike findings of the National Labor Relations Board or the Securities Exchange Commission, for example, where there is no resort to the District Court, but only to the Circuit Court of Appeals).

The Circuit Court of Appeals was not entitled either to substitute its own views on the facts, or those of the Maritime Commission, for the fact findings of the District Judge.

2. In holding petitioners liable to respondent, only a broker, for damages measured by a commission which respondent would have realized from de Bareno had $167,000 worth of automobiles been shipped, not an element of legal damages chargeable against a common carrier for failure to accept shipments, either at common law or by reason of any provision in Section 14 of the Ship-

ping Act (46 U. S. C. 812); and in refusing to hold respondent bound (if recognized at all as entitled to claim) by the fundamental obligation to avoid or mitigate damage by using a substitute equal-cost shipment route which was proved available but not sought by respondent.

3. In holding the petitioners to joint and several liability (as between themselves and also another carrier not served and out of business) instead of only such liability as each carrier might have incurred by reason of its own failure to perform a common carrier duty, merely because of association of the carriers in an approved Conference agreement under Section 15 of the Shipping Act (46 U. S. C. 814).

Neither the Shipping Act itself nor the Conference agreement (R. 119) contains any provision implying responsibility of one Conference member for the act or default of another member. It seems clear that the several Conference members retain their individuality of action and responsibility in all respects, particularly as Section 15 of the Shipping Act expressly relieves them from the penalties of the Sherman Anti-Trust Act and forbids their activities as Conference members being regarded as conspiracy.

It is contrary to the intent and purpose of the Shipping Act, as well as of the Interstate Commerce Act, that one carrier should be held liable for the default of another carrier, unless specifically assumed by contract or imposed by law such as was done by the Carmack Amendment (49 U. S. C. 20 (11)). The imposition of joint and several liability on conference members constitutes an improper and unjust burden on common carriers and on commerce.

4. In upholding jurisdiction of the Maritime Commission over a controversy allegedly based on Sections 14 and 22 of the Shipping Act, 1916 (46 U. S. C. 812, 821), notwithstanding that no regulatory or administrative question was involved therein, but only a claim for damages which was susceptible of orderly and complete determination by the Courts.

The decision is contrary to that of this Court in *L. & N. R.R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, and a long line of other decisions which have resulted from and been applied to proceedings before the Interstate Commerce Commission. The theory of those decisions applies equally to proceedings whether or no before the Maritime Commission.

There is nothing in this Court's decision in *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, which justifies the reliance placed thereon below as concerns jurisdiction of the Commission where the claim is merely that of one private party against another for damages for breach of a common carrier obligation to receive shipments, without involvement of any matter of administrative discretion or judgment. The Shipping Act, unlike the Interstate Commerce Act (49 U. S. C. 9), does not give an option to proceed either before Commission or Court. Even as concerns the Interstate Commerce Commission, court cases are generally left to be dealt with by the courts.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket No. 101, October Term, 1940, Roberto Hernandez, Inc., plaintiff-appellant v. Arnold Bernstein Schiffahrtagesellschaft, M.B.H., defendant, Compania Espanola de Navegacion Maritima S.A., and Compagnie Generale de Navigation a Vapeur Cyprian Fabre, defendant-appellees, and that the decision of said Circuit Court of Appeals in said case be reversed, and that your petitioners have such other and further relief in the premises as may be just.

New York City,
April 18, 1941.

COMPANIA ESPANOLA de NAVEGACION MARITIMA S.A., and COMPAGNIE GENERALE de NAVIGATION a VAPEUR CYPRIAN FABRE.

By BURTON H. WHITE
ROSCOE H. HUPPER
Counsel

Certificate

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

BURTON H. WHITE
Counsel
27 William Street
New York City

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIME S.A. and COMPAGNIE GENERAL DE NAVIGATION A VAPEUR CYPRIAN FABRE
Petitioners

AGAINST

ROBERTO HERNANDEZ, INC.
Respondent

BRIEF IN SUPPORT OF PETITION

Jurisdiction is based on Sec. 240 of the Judicial Code.

FIRST POINT.

The Circuit Court of Appeals had no power to set aside the fact findings of the District Court, and its clear error in doing so calls for summary reversal of its decision.

R. S. 649 (28 U. S. C. 773) provides: "The findings of the court upon the facts, * * * shall have the same effect as the verdict of a Jury."

Under Rule 52 of the Rules of Civil Procedure fact findings are not to be set aside unless clearly erroneous (*i. e.* as matter of law), and due regard must be given to the opportunity of the Trial Court to judge of the credi-

bility of the witnesses. This rule made it beyond the competency of the Circuit Court of Appeals to review the evidence; the rule embodies what has long been the law. *State Farm Insurance Co.* v. *Coughran,* 303 U. S. 485, 487. The Circuit Court of Appeals disregarded this rule when it substituted its own views and those of the Maritime Commission for the findings of the District Court. The firmness of the rule against fact review by the Circuit Court of Appeals is well attested by this Court's decision in *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481-5.

The Circuit Court of Appeals gave undue effect to Section 30 of the Shipping Act 1916 (46 U. S. C. 829) which makes the findings of the Maritime Commission "*prima facie* evidence" of the facts therein stated. Sec. 30 does not make the Commission's findings *conclusive* even if supported by evidence or substantial evidence, as does the National Labor Relations Act (29 U. S. C. 160 (e)) and the Securities Exchange Act (15 U. S. C. 78 y). Review of Labor Board and Securities & Exchange Commission decisions is made by the Circuit Court of Appeals, whereas review of the Maritime Commission decisions, like those of the Interstate Commerce Commission, is made in the first instance by the District Court, which tries the case fully on the evidence like any other case not previously heard by the Commission—except for the rule of evidence making the Commission's findings *prima facie,* which means they would stand if no further evidence were presented in the District Court, *provided* they had the support of some evidence.

In the instant case no evidence was submitted by respondent or petitioners before the Maritime Commission

concerning avoidance of damages. That subject was fully litigated for the first time at the District Court trial, and it was on the evidence then submitted at initiative of petitioners that the District Court based its findings.

It was a further glaring disregard of Rule 52 that the Circuit Court of Appeals without any evidence whatsoever raised the point that other carriers might also have refused space to respondent. It should not be assumed that carriers would act unlawfully. *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327.

SECOND POINT

Respondent's complete failure to avoid or mitigate damages foreclosed its claim against petitioners.

Respondent took no steps before the Commission to establish legal damages by showing either that it tried to secure transportation from others than the petitioners or that other means of transportation were not available. Legal damages do not accrue before the claimant establishes at least *prima facie* that he has no means of preventing or avoiding damages from breach of the alleged obligation. The authorities are positive that no damage accrues to him who does not take steps reasonably available to prevent them. See Williston on "Contracts" (1937 ed.) "Avoidable Consequences", vol. V Sec. 1353. Sec. 336 of "Restatement of the Law of Contracts". *Warren* v. *Stoddard*, 105 U. S. 224; *Grimwood* v. *Munson Line*, 273 Fed. 166, 167; *Cheatham* v. *Wheeling, etc. Co.*, 37 Fed. (2d) 593, 598; *The Oregon*, 55 Fed. 666, 673-4. *Fulton* v. *Canno*, 222 N. Y. 189.

At the trial in the District Court petitioners established by four highly qualified and disinterested shipping men that shipments could readily be and were being made to Bilbao over other routes (R. 23-41, 44-53). After analyzing the defects in the Commission's reasoning on damages, the District Judge said (R. 145):

"* * * There was no evidence adduced before the Commission nor in this suit to show that the plaintiff had endeavored to do so [avoid damages]. The defendants, on the other hand, did show that there was available a substitute service for the direct shipment from this country to Bilbao and that such transshipment via British or continental ports on through bills of lading was entirely feasible."

In *Hamilton* v. *McPherson*, 28 N. Y. 73 referred to by the Court (R. 163), the question of mitigation on proof "made by the defendants" had erroneously been taken from the jury. In the case at bar proof on mitigation was made by petitioners and the District Court found (equivalent to jury verdict) for them. That finding bound the Circuit Court of Appeals under Rule 52.

Filley v. *Pope*, 115 U. S. 213 and *Norrington* v. *Wright*, 115 U. S. 188 relied on by the Court were not relevant. Those cases involved breach of warranties in *sales* contracts, the first as to time of shipment, and the second as to place of shipment. The case at bar did not involve a warranty at all, but only damages sought for breach of a transportation obligation, to which ordinary rules of damage apply. If de Bareno desired cars to arrive at Bilbao there was no reason to assume, without proof on the point, that said usual articles of trade would not be as acceptable to him arriving by one route as another. The March 31, 1934 contract with the Conference lines distinctly contemplated alternative routes.

THIRD POINT

The Circuit Court of Appeals misapplied the law as to special damages.

Although right of action is asserted under Sec. 14 of the Shipping Act, 1916 (46 U. S. C. 812), respondent's real action was either for a tortious refusal to supply space in violation of petitioners' common law duties, or for breach of their March 31, 1934 contract with the respondent (R. 112-16). All of the damages claimed are special damages arising out of a contract with a third party, *i. e.*, the commission "contract" between Hernandez and de Bareno. No sufficient basis existed for finding special damages. See *Globe Ref. Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 544-5; *Mitsubishi* v. *Davis*, 291 Fed. 882, 885, aff'd 291 Fed. 57; *Czarnikow-Rionda Co.* v. *Federal S. R. Co.*, 255 N. Y. 33, 41; *Horne* v. *Midland Ry. Co.*, 8 C. P. 131.

Assuming the utmost for the evidence and the contentions made thereon, special damages (lost commission on sale) were not justified because:

1. It did not follow and could not legally be assumed that de Bareno would not accept shipments made over other than Conference lines when space on Conference lines was not available.

2. There was nothing to indicate that lines other than Conference Lines would not accept cars and transport them in regular course, and the Circuit Court of Appeals' suggestion in this regard is speculation only.

3. There is nothing to show that any of the several Conference lines was apprised of the refusal of any other

Conference line to accept shipments, and there was no reason for any line to assume such refusal.

4. There was no evidence either before the Maritime Commission or before the District Court that Arnold Bernstein Company was advised at any time that the contract provided that shipments must be made via Conference lines. Such a showing would be important as concerns the joint and several liability which was imposed below.

FOURTH POINT

The Circuit Court of Appeals erred in imposing joint and several liability.

There is not the slightest evidence in the record of any conspiracy on the part of the three lines or of any basis upon which a joint and several liability could properly be imposed. The refusals of the several lines to furnish space were several refusals, notwithstanding their membership in a Conference (R. 34-5) approved under Sec. 15 of the Shipping Act (46 U. S. C. 814). Their only conference activity with respect to the matter at bar was a minute in a Conference meeting quoting a cable which stated that the Shipping Board had ruled the lines could not refuse contracts or shipments (R. 96). This was sent June 14, 1934, in reply to a cable of June 9, both cables being before respondent was in a position to tender any cars for shipment, and unrelated to any representation by respondent. The "contract" with de Bareno was not made until June 24, 1934. This does not support, but denies, a combined effort on the part of the Conference to prevent respondent from obtaining space on Conference lines.

Sec. 15 of the Shipping Act merely permits agreements between competing carriers for the purpose of regulating competition between lines, and when approved by the Maritime Commission they are exempt from the provisions of the Sherman Anti-Trust Act. There is nothing in that Section, nor in the Conference agreement itself, which in any way makes one carrier responsible for the fault of another carrier, and such an interpretation and application should be avoided.

This question is of general commercial inportance, and of particular importance in this case in view of the fact that Arnold Bernstein Company has been liquidated (R. 35) and is not a party to the court proceedings although plaintiff seeks to hold the other lines for its refusals.

FIFTH POINT.

The Maritime Commission had no jurisdiction of the proceeding brought before it.

Notwithstanding that the complaint to the Maritime Commission, as well as in the District Court, charged discrimination under Sec. 14 of the Shipping Act, 1916, (46 U. S. C. 812) its real basis was that petitioners had wholly failed and refused to perform their lawful common carrier functions in respect to the transportation of unboxed automobiles to Bilbao, Spain. It was immaterial to respondent whether those functions were performed for others. The respondent had immediate recourse to the District Court for any legal damages, as the facts alleged did not require or justify invoking any regulatory or other process of the Maritime Administrative Commission.

Respondent was concerned only as a broker for a commission, was not the owner of the cars, and was not in position to be discriminated against in any sense contemplated by the Shipping Act.

The question presented on the claim was a simple question of fact on the merits of the case with mixed questions of fact and law as to the damages, if damages followed. There was nothing in the nature of the case which required the special knowledge and facilities of an administrative body. On the contrary, the questions raised were distinctly such as would ordinarily be passed upon by the Court. Under the decisions such controversies should go to the court in the first instance, *L. & N. R.R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70; *Powers* v. *Cady*, 9 F. (2d) 458; *Hines* v. *Henaghan*, 265 Fed. 831; *Royal Brewing Co.* v. *M. K. & T. Ry. Co.*, 217 Fed. 146; *Danciger* v. *Wells Fargo & Co.*, 154 Fed. 379.

The Circuit Court of Appeals in holding that the Maritime Commission had jurisdiction, relied upon the decision of this court in *United States Navigation Co.* v. *Cunard*, 284 U. S. 474. But that decision only required submission to the Maritime Commission of such controversies as involved "technical and intricate matters of fact" where "solution of the question would demand sound administrative discretion" where "accomplishment of the purposes of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision" whereby "could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend" (284 U. S. 482-3).

The Shipping Act gives no election to proceed either in court or before the Maritime Commission such as exists under Sec. 9 of the Interstate Commerce Act (49 U. S. C. 9).

LAST POINT

It is respectfully submitted that the writ should be granted and that the decision of the Circuit Court of Appeals be reversed.

BURTON H. WHITE
ROSCOE H. HUPPER
Counsel for Petitioners

New York City
April 18, 1941

APPENDIX

Statutes

Shipping Act 1916

Sec. 14 (46 U. S. C. 812)

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Sec. 15 (46 U. S. C. 814)

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action".

Sec. 22 (46 U. S. C. 821)

"That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for injury caused by such violation."

* * * * *

Sec. 30 (46 U. S. C. 829)

"Sec. 30. That in case of violation of any order of the board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the board in the premises.

In the district court the findings and order of the board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

* * * * *

Rules of Civil Procedure for the District Courts of the United States

Rule 52 A EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

MAY 16 1941
CHARLES ELMORE CROP
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 978.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA S. A. and COMPAGNIE GENERALE DE NAVIGATION A VAPEUR CYPRIAN FABRE,

Petitioners,

—against—

ROBERTO HERNANDEZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH K. INNESS,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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—against—

ROBERTO HERNANDEZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The findings of fact and orders of the United States Maritime Commission (R. 81-100) are reported in 1 U. S. M. C. 686 and 2 U. S. M. C. 62.

The opinion of the United States District Court for the Southern District of New York (R. 133-147) is reported in 31 Fed. Sup. 76.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 159-163) is reported in 116 Fed. (2d) 849.

II.

Statement of the Case.

The testimony before the Maritime Commission was introduced by petitioners as Defendants' Exhibit A in the District Court. By order of the Circuit Court of Appeals printing of this testimony as part of the record in that court was dispensed with, three typewritten copies of said exhibit having been furnished for use by that Court (R. 156). References herein which are not to the printed record are to the various hearings before the Examiner of the United States Maritime Commission and, for convenient reference, are identified by date of hearing and page number.

In June, 1934, respondent and one J. T. de Bareno entered into an oral contract whereby respondent agreed to ship automobiles of General Motors and Chrysler manufacture at a discount and to ship them via the Spanish Conference Line (petitioners herein) to de Bareno in Bilbao, Spain (R. 105; hearing April 6th, 1937, p. 54), that being the only direct route from New York to Bilbao (hearing April 6th, 1937, p. 7). By the terms of the agreement, respondent was required to ship $25,000 worth of such automobiles per month for a period of seven months from June to December, 1934, inclusive, purchases to total $175,000 (hearing April 6th, 1937, pp. 53-55; R. 104, 105). If, in any month or months, $25,000 worth of automobiles were not shipped, they were to be added to the shipments in the succeeding month or months (hearing April 6th, 1937, p. 54). Purchase of the automobiles was to be financed by de Bareno through

letters of credit or by cabling funds when requested (R. 106). All charges in connection with furnishing the automobiles were to be absorbed by de Bareno (hearing September 15th, 1938, p. 345) and respondent was to receive a profit of 15% on the contract sum of $175,000, namely, $26,250 (hearing April 6th, 1937, pp. 53, 65; R. 105, 106). On July 2nd, 1934, de Bareno, in part performance of the contract and his undertaking to finance the purchase, opened an initial letter of credit in favor of respondent in the sum of $14,200, to expire August 2nd, 1934 (R. 107).

Respondent, through its President, and a disinterested and independent freight brokerage firm, made continuous demands upon the petitioners herein, members of the Spanish Conference, for freight space for respondent's automobiles on their then sailing vessels or any succeeding sailings, but petitioners failed and refused to award space to respondent.

Petitioners were advised by respondent of the de Bareno contract, its terms and conditions, and that respondent would not only lose its profit, but might well be sued by de Bareno for failure to fulfill the contract if the petitioners persisted in refusing freight space to it (hearing April 6, 1937, pp. 57-59, 61).

Because of the refusal of the petitioners to award space de Bareno extended the expiration date of the original letter of credit from August 2nd to October 2nd, 1934, pending continued efforts to obtain space. Respondent did ship $8,000 worth of automobiles under the de Bareno contract on petitioners' vessels, which it was able to do only by boxing the same and calling them Reos and Whites rather than General Motors or Chrysler products. However, the remainder of $167,000 worth of cars could not be shipped by

respondent because of the petitioners' unlawful discrimination against it and the contract expired unfulfilled on December 31st, 1934 to that extent. Respondent was thereby damaged in the sum of $25,050, which sum represents the agreed profit of 15% on above mentioned sum.

Following the continued refusals of the petitioners to furnish space and upon expiration of the de Bareno contract, unfulfilled, the respondent wrote to the United States Shipping Board complaining of the discrimination (hearing April 6th, 1937, pp. 90-91; Complainant's Exhibit 8). In reply to this communication, the Shipping Board advised respondent that it could not treat the letter as a formal complaint but that respondent should avail itself of the remedies provided by statute. Thereupon and on or about June 27th, 1935, respondent herein filed a formal complaint with the United States Shipping Board against the members of the North American Spanish Conference, including the petitioners herein, to recover reparation for unlawful discrimination, pursuant to the Shipping Act of 1916, Title 46, U. S. C., Section 812.

Lengthy testimony, consisting of some seven hundred pages, and numerous exhibits, was taken before the Examiners of the United States Maritime Commission, which superseded the Shipping Board. On that record, and following two oral arguments before the Maritime Commission in Washington, D. C., the Commission found: (1) The existence of the contract between respondent and de Bareno, as alleged; (2) the respondent's continuing demand upon the petitioners for freight space; (3) the petitioners' unlawful discrimination against the respondent in violation of the Shipping Act; (4) the petitioners' knowl-

edge of the terms of the de Bareno contract; (5) the number of automobiles required to be shipped by respondent in order to fulfill its contract to ship $167,000 worth of cars; (6) the availability to the respondent of the required number of cars; (7) the availability of space on the petitioners' vessels for the carriage of said required number of automobiles; (8) that through petitioners' unlawful discrimination respondent was damaged in the amount of $25,050; (9) that the petitioners were jointly and severally liable for such damages (R. 81-89, 91-98); and entered its final order requiring the petitioners to pay to the respondent the sum of $25,050, with interest (pp. 99-100).

As the order of the United States Maritime Commission was not complied with, respondent instituted suit in the United States District Court for the Southern District of New York, pursuant to Title 46, U. S. C., Section 829.

On the trial in the District Court the respondent herein offered in evidence the findings and orders of the United States Maritime Commission and rested (R. 19-20). The petitioners introduced the record before the Commission, as Defendants' Exhibit A, and contended that the findings of the Commission were not supported thereby (R. 20).

No testimony was introduced in the District Court by any of the parties on the matters which were before the United States Maritime Commission. The only new matter offered on the District Court trial was testimony on behalf of petitioners in an effort to establish that respondent could and should have mitigated its damages by breaching the de Bareno contract which restricted shipments to Spanish Conference Line vessels (R. 105; hearing April 6th, 1937,

p. 54), that being the only direct route from New York to Bilbao (hearing April 6th, 1937, p. 7), and shipping the automobiles by some vague and undefined transshipment route to continental European and British ports and thence to Bilbao, Spain.

The District Court upheld the jurisdiction of the United States Maritime Commission and affirmed the Commission's findings with respect to the contract, the petitioners' knowledge of the terms thereof, the petitioners' unlawful discrimination and their joint and several liability. However, on no new evidence of any kind, the District Court held that the respondent had not proven its damages with sufficient certainty as to amount and further held that respondent should have mitigated its damages caused by petitioners' unlawful and willful discrimination by breaching the terms of the de Bareno contract, which restricted shipments to petitioners' lines and shipping by the aforesaid vague and undefined route to continental European and British ports and there transshipping to Bilbao, although there was no testimony showing what vessels sailed to Bilbao from such ports or the number of automobiles such vessels, if any, could and would accommodate.

Judgment was entered in the District Court dismissing the complaint, from which an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit.

The matter was fully briefed and argued in the Circuit Court of Appeals, which Court affirmed the Maritime Commission and the District Court as to the existence of the contract, petitioners' knowledge of its terms, the continuous demands on the part of the respondent for freight space, the petitioners' unlawful discrimination against respondent, and the joint and

several liability of the petitioners for the damages suffered. The Circuit Court of Appeals further found that the record before the Maritime Commission contained substantial evidence establishing respondent's damages in the sum of $25,050 and, since there was no additional evidence of any kind introduced before the District Court on that subject, reversed the District Court, with direction to enter judgment enforcing the final order of the Commission.

In addition, the Circuit Court pointed out that petitioners had not sustained their burden of proof that damages could be mitigated and held that the provision of the de Bareno contract restricting the shipments to Spanish Conference Line vessels, the only direct route from New York to Bilbao, was of consequence and a material part of that contract and that the District Court had neither the means nor the right to determine why the parties so contracted and erred as a matter of law in holding that respondent should have ignored this material provision of the contract and shipped the automobiles by a transshipment route, vaguely referred to, and undefined by the petitioners in the testimony before the District Court (R. 162).

POINT I.

The decision of the Circuit Court of Appeals is correct on principle and authority.

(A) The United States Maritime Commission had jurisdiction.

In spite of petitioners' statement to the contrary, the respondent herein was a shipper within the meaning of the Shipping Act, 1916, Section 14 (Title 46,

U. S. C., Sec. 812, subdivision Fourth). The record before the Commission proves that respondent purchased automobiles in its own name, paid for them, engaged freight space for their transportation, shipped them in its own name and paid the freight for such transportation.

When this matter first came before the United States Maritime Commission, the petitioners herein defended on the ground that they could not ship the respondent's automobiles, due regard being had for the proper loading of the vessels and available tonnage. The petitioners themselves urged upon the Commission that much would depend upon the basic cargoes available, such as grain (hearing April 7th, 1937, p. 260), thereby urging that intricate questions of fact, involving technical knowledge, must be determined and given proper effect in the light of the requirements of correct maritime methods relating to the stowage of the particular kind of freight. Petitioners now urge the contrary before this Court.

Although the question of jurisdiction was not raised before the Maritime Commission, but was raised for the first time in the District Court, both the District Court and the Circuit Court of Appeals, with the entire record before them, applied the tests laid down by this Court in *U. S. Navigation Co.* v. *Cunard,* 284 U. S. 474, and properly held that the solution of the question of unjust discrimination depended on technical knowledge in the light of the tonnage and the manner in which the vessels should be loaded, as well as upon involved and intricate factual matters, and thus properly upheld the jurisdiction of the Commission.

(B) The petitioners were properly held jointly and severally liable.

The statement by the petitioners that joint and several liability was based "solely" on the fact that the carriers were associated in a conference is incorrect.

The petitioners were held jointly and severally liable because of the finding by the United States Maritime Commission, by the District Court, and by the Circuit Court of Appeals, that they actively planned together to injure the respondent. The basis of holding the petitioners jointly and severally liable was their concert of action and common intent and purpose in this respect, and was not based on the circumstance that they were associated in a conference under the Shipping Act (R. 96-98).

In addition, the petitioners now attempt to retry the facts, and in particular the force and effect of a certain cable sent to an automobile distributor in Bilbao, Spain, in answer to his complaint regarding respondent's shipments to that port, in which the petitioners stated that they sympathized with the said distributor and emphasized that no automobiles had, as yet, been shipped. It is respectfully submitted that the findings of fact of the Maritime Commission, the District Court and the Circuit Court of Appeals are conclusive and that issue is not properly before this Court.

Petitioners also urge that the question of joint and several liability becomes important because one of the members of the Spanish Conference, originally sued, has been liquidated and contribution from it

cannot be had by the petitioners herein. In Cooley on Torts, 4th Ed., page 255, it is said:

> "In determining whether a participant in a tort shall be held liable as a joint tort-feasor, the court will not give any consideration to the question whether he would have any remedy for contribution against the other, since the court does not concern itself with the respective rights of wrongdoers among themselves * * *."

The finding of joint liability by the Commission, and all of the courts, is based on facts supported by substantial evidence and conforms with the authorities as set forth by the Commission (R. 97, 98).

(C) The Circuit Court of Appeals correctly reversed the District Court on the question of mitigation of damages.

The uncontradicted evidence is that the contract between respondent and de Bareno provided for shipments only on Spanish Conference line vessels. This fact was testified to by both parties to the contract (R. 65, 69, 71, 72, 105; hearing April 6th, 1937, p. 54).

The reason for such condition in the contract is apparent. The Spanish Conference line vessels were the only vessels running directly from New York to Bilbao, Spain. Shipment to continental European and British ports and transshipment from those ports to Bilbao, Spain, assuming there were services which would and could have accommodated respondent's automobiles, would have involved additional hazards which de Bareno was unwilling to accept. Transshipment would be slow, it would necessitate extra handling at transshipment points, it would increase

the risk of damage to unboxed automobiles, it would subject the unboxed automobiles to risk of theft and damage at foreign ports while awaiting arrival of on-carrying vessels, and it would increase the insurance risk and premiums. These are very real objections to transshipment and justify de Bareno's requirement that shipments be made only on petitioners' vessels, the only direct route to Bilbao, if, in fact, justification is necessary.

It is submitted that the parties to the de Bareno contract where within their rights in contracting with respect to the route, that the condition was of consequence and a material part of the contract, and that the District Court had neither the means nor the right to determine why the de Bareno contract contained such condition or warranty, although, in the case at bar, the reason is obvious.

Norrington v. *Wright,* 115 U. S. 188;
Filley v. *Pope,* 115 U. S. 213;
Lamborn v. *National Bank of Commerce,* 236 U. S. 469.

Furthermore the defense of mitigation of damages was not raised before the Maritime Commission, but was raised for the first time in the District Court. The burden of proving this defense was upon the petitioners herein.

Hamilton v. *McPherson,* 28 N. Y. 72.

Testimony introduced by petitioners was of the vaguest sort. There was no proof whatever that lines running out of continental European and British ports to Bilbao could or would have accommodated

the automobiles which respondent was required to ship in order to fulfil the de Bareno contract. It is, therefore, submitted that even if the contract did not provide for shipments on Spanish Conference Line vessels only, the petitioners failed to prove with sufficient certainty that the respondent could have mitigated damages by the means suggested.

In support of their argument on mitigation of damages the petitioners lay great stress on the contract dated March 31st, 1934 entered into between respondent and the members of the Spanish Conference Line. They urge that the provision permitting respondent, without prejudicing its position regarding future shipments, to ship by lines other than the Spanish Conference lines, in the event the latter did not furnish space, required respondent to ignore the terms of the de Bareno contract with respect to shipments only on Spanish Conference line vessels.

Certainly the fact that the contract of March 31st, 1934 permitted respondent to seek space elsewhere in the event the carriers failed to furnish the same, without prejudicing respondent's future rights under the contract, could not affect the respondent's duties and obligations under the de Bareno contract which was entered into in June, 1934. It would scarcely be an answer to de Bareno for respondent to say: "I know your contract with me restricts shipments to Spanish Conference line vessels only, but you must take shipments by any means I see fit because I have a contract with the Spanish Conference which permits me to ship on other lines if they refuse me space."

Respondent's contract with the Spanish Conference could have no possible bearing on the materiality of the provisions in the de Bareno contract.

The portion of the March 31, 1934 contract which should have been emphasized by the District Court is Paragraph 1 wherein the respondent herein agreed to ship only on Spanish Conference line vessels and the petitioners herein agreed to carry all such shipments for respondent (R. 113); which they failed and unlawfully refused to do.

POINT II.

Rule 52 of the Rules of Civil Procedure is not applicable.

The application of Rule 52 of the Rules of Civil Procedure was urged by petitioners before the Circuit Court of Appeals without effect. The trial originated before the United States Maritime Commission. The Commission is the fact-finding body.

> *Florida* v. *U. S.*, 282 U. S. 194, 215;
> *Manufactures R. Co.* v. *U. S.*, 246 U. S. 247;
> *Meeker* v. *Lehigh*, 236 U. S. 412;
> *Spiller* v. *Atchison T. & S. Co.*, 253 U. S. 117;
> *Southern Pacific Co.* v. *Goldfield Consolidated Milling & Tea Co.*, 220 Fed. 14;
> *Montrose* v. *St. Louis*, 25 Fed. (2d) 750, 753, affd. 25 Fed. (2d) 755;
> *N. Y., N. H. & H. R. Co.* v. *Ballon & Wright*, 252 Fed. 862, 865.

It alone had the opportunity to judge the credibility of the witnesses before it, none of whom appeared before the District Court with the exception of Mr. Hernandez. The qualifications of expert wit-

nesses and their credibility were for the Maritime Commission to decide.

> *Spiller* v. *Atchison T. & S. Co.*, 253 U. S. 117, 130.

The contract with de Bareno, its terms and conditions, the demands for freight space, petitioners' unlawful discrimination, petitioners' knowledge of the terms of the de Bareno contract, the number of automobiles required to be shipped, the availability of the required number of automobiles, the financial ability of respondent to perform the contract, and the damages suffered by respondent were issues tried before the Maritime Commission, which made its findings supported by substantial evidence and, in most instances, on uncontradicted evidence.

No evidence on these questions was introduced in the District Court. The new matter introduced by petitioners in the District Court was confined to the question of mitigation of damages, which has been dealt with previously.

The United States Shipping Act, 1916, Title 46, U. S. C. Section 829, provides:

> "In the District Court the findings and order of the Board shall be prima facie evidence of the facts therein stated * * *."

On no new evidence before the District Court it was its duty to affirm the findings of the Commission if supported by substantial evidence.

> *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 Fed. (2d) 663.

The District Court erred in substituting its views of the testimony for those of the United States Maritime Commission and the Circuit Court of Appeals correctly rectified that error.

POINT III.

Comment on petitioners' moving papers and brief.

The petition and brief proceed on the theory that this Court will review the facts.

Their constant quoting of the word "contract" and the words "oral contract" is for the purpose of casting doubt upon its existence. Petitioners lose sight of the fact that the contract was found, by the United States Maritime Commission, the District Court and the Circuit Court of Appeals, to have in fact existed.

A written contract is of no higher dignity than an oral one except under the Statute of Frauds, which statute is not here involved.

> *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 Fed. (2d) 823, 834.

Similarly, petitioners' constant characterization of the contract as a "commission contract" has no proper place in their application before this court, as the finding of all three trial bodies was to the contrary.

Nor has the force and effect of petitioners' joint cable sent to a distributor in Spain, in response to his objections to respondent's shipments of automobiles to Bilbao, any proper place in this application for a writ. The effect of that cable, coupled with other testimony, was found by all three trial bodies and is not here subject to review.

Throughout their moving papers, petitioners refer to "additional evidence" before the District Court in an effort to convey the impression that the questions before the Maritime Commission were the subject of additional proof in the District Court. This is not the fact. The new evidence before the District Court was confined to the question of possible mitigation of damages, which question was raised for the first time in that Court.

Petitioners' repeated assertion that joint and several liability was imposed merely because of association of the carriers in an approved conference agreement is erroneous. The basis of joint liability was the concert of action and common intent and purpose of the petitioner to injure the respondent in its business. The conference agreement was merely a circumstance which doubtless facilitated the concert of action on the part of the petitioners.

POINT IV.

The application should be denied.

This case does not involve a question of public concern, nor is it one of general importance, nor is there any contention that uniformity of decisions is involved.

The decision of the Circuit Court of Appeals is in accord with the law.

It is, therefore, respectfully submitted that the petition for certiorari should be denied.

New York City, May 14, 1941.

JOSEPH K. INNESS,
Counsel for Respondent.